

**IN THE MATTER OF ARBITRATION BETWEEN:**

THE AMERICAN FEDERATION )  
OF GOVERNMENT EMPLOYEES, )  
COUNCIL 238, AFL-CIO, )  
Union, )  
v. )  
U.S. ENVIRONMENTAL PROTECTION )  
AGENCY, )  
Agency. )

Fair Labor Standards Act ("FLSA")  
Overtime Grievance

**Final Settlement Agreement**

This Final Settlement Agreement is entered into by and between the U.S. Environmental Protection Agency, (hereafter referred to as the "Agency") and the American Federation of Government Employees, Council 238, (hereafter referred to as the "Union"), collectively referred to as the "Parties." On or about August 22, 2008, the Union filed a Grievance (hereafter referred to as the "FLSA Grievance") alleging violations of the Fair Labor Standards Act (FLSA) on behalf of all bargaining unit positions and employees at the Agency represented by the Union.

Since the filing of this FLSA Grievance, the Parties engaged in extensive settlement negotiations in an effort to narrow the scope of the unresolved issues in the FLSA Grievance. The Parties executed a Partial Settlement Agreement on FLSA Reclassification on or about July 29, 2011, and an Addendum to the same on or about January 23, 2013, resolving the Exemption status issues. The Parties have now reached agreement on all damages and other monetary issues, hereby resolving the FLSA Grievance in full. The Parties hereby incorporate that Partial Settlement Agreement on FLSA Reclassification and its Addendum as part of this Final Settlement Agreement.

The Parties now enter into this Final Settlement Agreement in full resolution of any and all claims which were or could have been raised by the Union in the FLSA Grievance, including, but not limited to, FLSA designations/classifications, costs, fees, back pay, and FLSA overtime compensation of any kind. The employees covered by this Final Settlement Agreement include all Bargaining Unit employees (hereafter referred to as "BUEs") who held, or could have held, a bargaining unit position at any

time from August 22, 2006 until the Effective Date of this Agreement. The covered timeframe is from August 22, 2006 until the Effective Date of this Agreement.

Accordingly, in consideration of the mutual obligations, promises, and consideration described in this document, the Parties hereby agree to the following:

### **1. Non-Admission Clause**

This Final Settlement Agreement does not constitute an admission by either Party that either Party has violated any statute, regulation, or the Parties' Collective Bargaining Agreement, and is entered into solely for the purpose of globally resolving and settling all issues contained in the FLSA Grievance.

### **2. Union Withdrawal of Grievance, Waiver of Claims**

Upon full execution of this Final Settlement Agreement, the Union, on behalf of all real or potential BUEs, past and present, shall withdraw the FLSA Grievance with prejudice.

In addition, the Union, on behalf of all real or potential BUEs, past and present, agrees to release and waive its right to file any complaint, claim, lawsuit, grievance, or appeal against the Agency, its officials, employees, former officials or former employees, or their successors and assignees, including any and all claims against Agency officials, employees, or former officials or employees, in both individual and official capacities, in any state or Federal court, or before any administrative body, tribunal, board, or commission, regarding any matter that was raised or could have been raised in the FLSA Grievance for the timeframe(s) covered by the FLSA Grievance.

In particular, the Union releases and forever irrevocably discharges the United States Government, including the Agency, and its respective officers, agents and employees, separately and collectively, from any and all liabilities, obligations, claims and demands, whether in law or in equity, arising out of (1) the FLSA Exemption status of any real or potential BUE who was in the bargaining unit for the covered time period; and (2) any claim for compensation, damages, costs or fees under the FLSA for any real or potential BUE for the covered time period. The Union further agrees that it will not arbitrate or litigate the matters asserted in its FLSA Grievance for the covered timeframe for covered real or potential BUEs, other than a claim of noncompliance with this Final Settlement Agreement, and/or with the Partial Settlement Agreement on FLSA Reclassification and/or its Addendum. To the extent the Union seeks to arbitrate or



litigate any such claim(s) of noncompliance, the Union will first follow the procedures described in Section 7 herein.

In addition, the Union agrees to withdraw the Information request filed on September 4, 2009, the supplemental information request filed on January 8, 2009 and any other information request filed in connection with the FLSA Grievance.

### **3. Reclassification/Redesignation**

- a. Pursuant to Section 5(a) of this agreement, within thirty (30) calendar days from the Effective Date of this Agreement, the Agency will provide the Union with quarterly BUE lists for the period of August 22, 2005 through the Effective Date of this Agreement.
- b. The Union agrees that, within thirty (30) calendar days after receiving the BUE lists, it will provide the Agency with a notification, listing any employees/positions it believes are not properly classified pursuant to the Partial Settlement Agreement on FLSA Reclassification and its Addendum.
- c. The Agency agrees, within sixty (60) calendar days from receiving the notification in Section 3(b) above or, if no notification is provided, from the expiration of the thirty (30) day period provided in Section 3(b) above, to, make all changes necessary to ensure it is currently in full compliance with the Partial Settlement Agreement on FLSA Reclassification and its Addendum.
- d. The Agency agrees not to retroactively change the bargaining unit status of any employee represented by the Union.

### **4. Monetary Relief**

The Parties agree that the following describes the entire monetary relief for the Union on behalf of the entire class of those eligible for damages.

The Parties agree that the Agency shall pay to Snider & Associates, LLC, counsel for the Union, a Total Lump Sum Payment of Thirty-Five Million Dollars and no cents (\$35,000,000.00), of which Thirty Million Dollars (\$30,000,000.00) shall be paid within sixty (60) calendar days from the Effective Date and Five Million Dollars (\$5,000,000.00) shall be paid on or before December 1, 2014. This Total Lump Sum Payment shall constitute the Union Settlement Fund, in recognition and settlement of any and all potential liability for all issues and claims relating to the FLSA Grievance that



arose from the claims raised or potentially raised in this case for the period of time beginning no earlier than August 22, 2006 through the Effective Date. This Total Lump Sum Payment amount settles all claims for relief contained in the FLSA Grievance filed on August 22, 2008, including but not limited to (a) unpaid entitlement to overtime, including "capped" overtime claims; (b) unpaid entitlement to compensatory time; (c) unpaid entitlement to credit time, including "capped" credit time claims; (d) unpaid entitlement to "suffered or permitted" overtime as defined by the FLSA; (e) unpaid entitlement to travel time overtime; (f) unpaid entitlement to training time overtime; (g) unpaid entitlement to standby pay or on-call pay overtime; (h) unpaid entitlement to any and all types of premium pay overtime; (i) the Agency's share of any employer obligations arising under FICA or any emoluments for payments made to employees as a result of this Agreement; (j) interest owed on damages claimed in (a) through (i) above; (k) liquidated damages with regard to (a) through (i) above; (l) Title V overtime for properly exempt employees and (m) attorney fees and costs claimed by Union's counsel of record in this FLSA Grievance, including costs and expenses of implementation of this Final Settlement Agreement. This payment constitutes a full and complete settlement and full resolution of any and all claims which have or could have been raised by the Union in the FLSA Grievance for all real and potential BUEs.

The Parties agree that by paying the aforementioned Total Lump Sum Payment, the Agency is relieved now and forever from any and all monetary liability in connection with any and all claims which could have been raised by the Union with respect to any real or potential BUE in the FLSA Grievance or in connection with the FLSA Grievance, except as to any dispute resolved under the enforcement provisions of this Agreement. The Parties further agree that this Total Lump Sum Payment is a negotiated settlement of far greater claims and is therefore subject to allocation by the Union in a manner which may not be consistent with any internal Agency allocation.

All outstanding, unpaid arbitration/mediation costs and/or arbitration/mediation fees resulting from the FLSA Grievance, or any other outstanding matters involved with the Arbitrator/Mediator in connection with the FLSA Grievance or this Final Settlement Agreement, will be halved and paid equally by the Parties within sixty (60) calendar days from the Effective Date.

#### **5. Administration: Distribution of Settlement Funds**

The Union Settlement Fund will be allocated, divided and distributed by the Union or its designated agent(s) in a fair and equitable manner, as directed by the Union. The Union may, in its sole discretion, determine amounts to be paid for all items covered by the Agency's Total Lump Sum Payment, including which BUEs may



participate in any claims and/or payment process. The Union agrees not to consider race, color, religion, sex, disability, sexual orientation or genetic information when determining which BUEs will receive compensation. Except as specifically provided for in this Final Settlement Agreement, the Agency shall not participate in any way in the Union's payment and/or claims process or the distribution of settlement funds, including, but not limited to, performing any calculations or determinations regarding allocation, division and said distribution.

In advance of making any payments to the BUEs, the Union agrees to provide the BUEs a description of the process by which BUE entitlements are calculated, including the amounts of damages being paid. Records of all payments will be maintained by the Union for at least six (6) years. The Agency may request those records at any time if the Agency is audited and it is determined the provision of those payment records are necessary.

The Parties agree that the Agency shall not be responsible for paying any state, local or federal taxes or withholding or emoluments due as a result of Union Settlement Fund payments, or issuing any W-2, 1099 or any other form to any individual receiving payment under this Final Settlement Agreement. The Union, in distributing funds, is solely responsible for advising employees that they may be subject to the payment of taxes associated with the receipt of said funds. Further, the Union is solely responsible for resolving any disputes or other matters raised by employees relating to distribution of funds from the Union Settlement Fund.

Furthermore, the Parties agree that the Agency will not be held responsible for providing the Union or any BUE with additional information in connection with this FLSA Grievance and/or this Final Settlement Agreement and/or matters related to the administration of the Union Settlement Fund, except as set forth below. Regarding the information to be provided by the Agency to the Union, the Parties agree that all of this information is both relevant and necessary to effectuate the settlement of this matter and the distribution of funds. The Parties stipulate that, to the extent this information is prohibited from disclosure pursuant to the Privacy Act or for any other reason, the information is subject to a routine use exception and is fully disclosable as set forth herein.

The Union stipulates that the information released by the Agency in accordance with the below shall not be utilized by the Union or its designated representative(s) for any other purpose or in any other fashion other than to facilitate and effectuate the Union's distribution of settlement funds.



**a.** Within thirty (30) calendar days from the Effective Date, the Agency shall provide to Union counsel, in Excel format, quarterly BUE lists for the period of August 22, 2005 through the Effective Date of this Final Settlement Agreement. These bargaining unit lists will include, at a minimum, the following historical data points: list date, name, grade, series, step, position title, geographic location and FLSA status.

**b.** Within sixty (60) calendar days following receipt of the information in (a) above, the Union shall submit to the Agency a comprehensive listing, in Excel format, of all current and former BUEs who the Union then believes are likely to receive a payment from the Union Settlement Fund. This list shall include the names of any additional real or potential BUEs identified by the Union who held a bargaining unit position during the covered timeframe and were not previously provided by the Agency in accordance with (a), above.

**c.** Within sixty (60) calendar days following receipt of the information in (b) above, the Agency shall provide to Union counsel, in Excel format, for each BUE identified in (b), the available last known mailing address, email address, and social security number. The Agency shall also provide, for each BUE identified in (b), the overtime/compensatory time records for the period of August 22, 2005 through the Effective Date. This overtime/compensatory time data shall be provided in raw, unmanipulated data format, in Excel, and will include, at a minimum, the following data points: date, name, grade, series, step, position title, geographic location, FLSA status, schedule, pay rate, hours of OT earned, hours and dollar amounts of OT paid, hours of compensatory time earned, hours of compensatory time used, hours of compensatory time lost and hours and dollar amounts of compensatory time paid. Upon the Union's receipt of the information described in this Section, the Agency's obligation to provide information to the Union, pursuant to this Final Settlement Agreement, ceases.

Should the Union identify additional BUEs, whom were not previously identified by the parties, pursuant to Sections 3 and 5 of this agreement, the Agency agrees to work with the Union to respond to requests for employee information which may be necessary for the Union to process employee claims under the Union Settlement Fund.

Further, this Final Settlement Agreement releases both Parties from any liability to the other Party or future claims from the other Party resulting from any representation, information or statement disclosed by either Party in the course of the resolution of the FLSA Grievance and the reaching of this Final Settlement Agreement,



should it be found hereafter, by either Party, to have been incomplete, inaccurate, or erroneous.

The Union's designated representatives may make reasonable use of Agency resources, including the Agency email system, to send and receive notices and information to and from BUE employees regarding implementation of this Final Settlement Agreement, and BUE employees may make reasonable use of Agency resources (email, computer, phone, fax, time, etc.) to participate in implementation, including any claims process.

#### **6. Hold Harmless; Reimbursement for Damages**

To the extent that the Union believes that employees did not receive payment or were delayed payment due to the Agency's alleged failure to provide the Union with any name(s) and/or data, or provides inaccurate information to the Union with respect to any individual(s) covered under this Agreement, the Union may raise this issue with the Agency and, if appropriate, seek any back interest that may be owed to the employee. The Union agrees to hold the United States and the Agency (which for purposes of this section includes all employees, representatives, and agents) harmless for any claims arising between the Union and any employee, Union or Non-Union member, party or individual concerning any action taken by the Union in entering into or implementing this Agreement. The Union agrees to hold the United States and the Agency harmless for any claims arising between the Union and any party or individual over the distribution of funds paid to the Union pursuant to this Agreement. The Agency, the United States, and all of their attorneys, representatives and other agents who participated in the negotiation of this Agreement shall not be held responsible in any way regarding the distribution of any settlement funds flowing from this Agreement. The Union further agrees that it will indemnify and reimburse the Agency for any damages resulting from any finding of liability, including but not limited to joint and several liability, regarding any alleged misconduct in distributing any settlement payment made under this Agreement. The Union also agrees to hold the United States and the Agency harmless and to indemnify them for any claims made by any real or potential, past or present member of the bargaining unit who may raise a claim in any forum alleging a violation of the FLSA occurring during the covered timeframe.

This Final Settlement Agreement releases both Parties from any liability or future claims resulting from any representation, information or statement disclosed by either Party in the course of the resolution of the FLSA Grievance and the reaching of this Final Settlement Agreement, should it be found hereafter, by either Party, to have been incomplete, inaccurate, or erroneous.



## **7. Dispute Over Terms**

In the event that a dispute arises regarding the terms of this Agreement or over the implementation of this Agreement, the Union and Agency agree to attempt to mutually resolve the dispute. The Party alleging a dispute shall notify the other party within sixty (60) calendar days from the date the issue giving rise to the dispute is known, or should reasonably have been known, to the raising Party. If the Parties are unable to mutually resolve their dispute within sixty (60) calendar days from the notification, the Parties agree to submit the dispute to Joshua Javits to resolve any such dispute. If Joshua Javits is unavailable to hear the dispute, an Arbitrator shall be selected pursuant to the procedures set forth in the Collective Bargaining Agreement between the Parties.

## **8. Non-Precedential Nature of Agreement.**

This Final Settlement Agreement is for the sole purpose of settling the matters and claims raised or which could have been raised in the FLSA Grievance and stated herein, and may not be introduced as evidence by either Party, their representatives or their successors or assigns, in any type of litigation, proceeding or dispute between the Parties other than to enforce the terms of this Agreement. Accordingly, this Final Settlement Agreement shall not be cited as precedent in any future grievance, arbitration or litigation between the Parties, and shall not bind the parties in any proceedings, whether judicial or administrative in nature, except as necessary to effect the terms of this Final Settlement Agreement.

## **9. Future Actions**

The Parties agree that, in the future, the Agency may designate or redesignate current or future bargaining unit positions as FLSA Exempt (or Non-exempt) in accordance with applicable law, rule or regulation. Notice of reclassifications shall be provided per the applicable CBA. Any FLSA exemption status disputes, other than those associated with this Final Settlement Agreement and discussed above in Section 3, will be resolved in accordance with the applicable procedures in the applicable Collective Bargaining Agreement.

## **10. Amendments or Modifications**

This Final Settlement Agreement may not be amended or modified in any manner, except in writing, signed by an authorized representative(s) of both Parties.



#### **11. Merger/Severability/Integration**

This Final Settlement Agreement contains the entire understanding between the Parties and there are no other terms express or implied. The terms and conditions of this Final Settlement Agreement are contained exclusively within this Final Settlement Agreement and have been voluntarily agreed upon by the Parties after consultation with their respective counsel.

If, other than the payment provision in Section 4, any portion of this Final Settlement Agreement is determined to be unenforceable, the rest and remainder of this Final Settlement Agreement will remain in full force and effect.

#### **12. Authority of the Parties**

The Parties agree that they have full authority to enter into this Final Settlement Agreement and to make the promises, representations and releases contained herein.

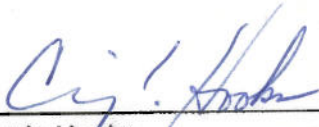
#### **13. Signatures**

The Parties stipulate that their signatories have actual authority to enter into this Final Settlement Agreement and to bind their respective Party, successors and assigns.

The Parties agree that any signatures affixed to this Final Settlement Agreement via photocopy or facsimile are valid and enforceable as substitutes for the original signatures.

#### **14. Effective Date**

This Final Settlement Agreement is effective upon execution by the Parties.

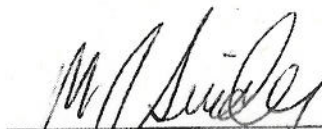
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Craig Hooks                      Date  
Assistant Administrator  
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 2/21/14  
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Karen Kellen                      Date  
President, AFGE Council 238

 2/24/14

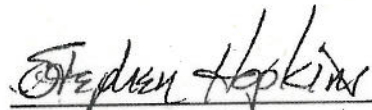
Ken White  
Agency Representative

Date

 2/24/14

Michael J. Snider, Esq.  
Counsel, AFGE Council 238

Date

 2/19/2014

Stephen R. Hopkins  
First Vice President, AFGE Council 238

Date